

No. 18-12

In the
Supreme Court of the United States

JOSEPH A. KENNEDY,
Petitioner,

v.

BREMERTON SCHOOL DISTRICT,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court
of Appeals for the Ninth Circuit

**Brief *Amici Curiae* of Billy Graham
Evangelistic Association, Samaritan's Purse,
National Association of Evangelicals, Ethics &
Religious Liberty Commission of the Southern
Baptist Convention, Congressional Prayer
Caucus Foundation, Concerned Women for
America, National Legal Foundation, Pacific
Justice Institute, and International Conference
of Evangelical Chaplain Endorsers
*in support of Petitioners***

Steven W. Fitschen
The National Legal
Foundation
524 Johnstown Rd.
Chesapeake, VA 23322

Frederick W. Claybrook, Jr.
(Counsel of Record)
Claybrook LLC
700 Sixth St., NW, Ste. 430
Washington, DC 20001

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INTERESTS OF *AMICI CURIAE*¹

Billy Graham Evangelistic Association ("BGEA") was founded by Billy Graham in 1950, and continuing the lifelong work of Billy Graham, exists to support and extend the evangelistic calling and ministry of Franklin Graham by proclaiming the Gospel of the Lord Jesus Christ to all we can by every effective means available to us and by equipping the church and others to do the same. BGEA ministers to people around the world through a variety of activities including Decision America Tour prayer rallies, evangelistic festivals and celebrations, television and internet evangelism, the Billy Graham Rapid Response Team, the Billy Graham Training Center at the Cove, and the Billy Graham Library. Through its various ministries and in partnership with others, BGEA intends to represent Jesus Christ in the public square; to cultivate prayer, and to proclaim the Gospel. Thus, it is concerned whenever government acts to restrict and inhibit the free expression of the Christian faith those activities represent.

Samaritan's Purse is a nondenominational evangelical Christian organization formed in 1970 to provide spiritual and physical aid to hurting people around the world. The organization seeks to follow the

¹ Pursuant to Supreme Court Rule 37, all Parties have received timely notice of intent to file this brief and have consented to its filing. No Party or Party's Counsel authored this Brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *Amici Curiae*, their members or their Counsel, contributed money that was intended to fund the preparation or submission of this Brief.

command of Jesus to “go and do likewise” in response to the story of the Samaritan who helped a hurting stranger. Samaritan’s Purse operates in over 100 countries providing emergency relief, community development, vocational programs and resources for children, all in the name of Jesus Christ. Samaritan’s Purse’s concern arises when government hostility prevents persons of faith from practicing core aspects of faith such as prayer, discipleship, evangelism, acts of charity for those in need, or other day-to-day activities of those practicing their sincerely held religious beliefs.

The **National Association of Evangelicals** (“NAE”) is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries, and independent churches. NAE serves as the collective voice of evangelical churches, their religious ministries, and separately organized evangelical ministries. It believes that religious liberty is a God-given right that is recognized in and protected by the First Amendment and other federal laws, and that church-state separation is a part of our nation’s constitutional structure designed to safeguard the autonomy of religious organizations. NAE believes that civil government has a high duty to not just protect but to promote religious freedom.

The **Ethics & Religious Liberty Commission** (“ERLC”) is the moral concerns and public policy entity of the Southern Baptist Convention (“SBC”), the nation’s largest Protestant

denomination, with over 46,000 churches and 15.2 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution's guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith.

The **Congressional Prayer Caucus Foundation** ("CPCF") is an organization established to protect religious freedoms (including those related to America's Judeo-Christian heritage) and to promote prayer (including as it has traditionally been exercised in Congress and other public places). It is independent of, but traces its roots to, the Congressional Prayer Caucus that currently has over 100 representatives and senators associated with it. CPCF has a deep interest in the right of people of faith to speak, freely exercise their religion, and assemble as they see fit, without government coercion. CPCF reaches across all denominational, socioeconomic, political, racial, and cultural dividing lines. It has an associated national network of citizens, legislators, pastors, business owners, and opinion leaders hailing from thirty-three states.

Concerned Women for America ("CWA") is the largest public policy women's organization in the United States, with a half-million members throughout all 50 states. Its members are people

whose voices are often overlooked—average, middle-class American women whose views are not represented by the powerful elite. For over 30 years, CWA has actively promoted legislation, education, and policymaking consistent with its philosophy, lending a voice to conservative women in the culture, the legislatures, and the courts. Through its grassroots organization, CWA advocates for traditional virtues that are central to America’s cultural health and welfare. One of CWA’s seven core issues is protecting religious liberty.

The **National Legal Foundation** (“NLF”) is a public interest law firm dedicated to the defense of First Amendment liberties, including the freedoms of speech, assembly, and religion. The NLF and its donors and supporters, in particular those from Washington state, are vitally concerned with the outcome of this case because of its effect on the speech rights of people of faith who work in the public sector. The NLF has frequently served clients whose rights have been threatened in similar situations.

The **Pacific Justice Institute** (“PJI”) is a non-profit legal organization established under § 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of the First Amendment. Such includes civil litigation and criminal defense to vindicate the rights of free speech in various environments. As such, PJI has a strong interest in the development of the law in this area.

The **International Conference of Evangelical Chaplain Endorsers** (“ICECE”) has as its main function to endorse chaplains to the military and other organizations requiring chaplains that do not have a denominational structure to do so, avoiding the entanglement with religion that the government would otherwise have if it determined chaplain endorsements. ICECE safeguards religious liberty for chaplains and all military personnel. ICECE’s member organizations employ retired chaplains as their officers.

SUMMARY OF THE ARGUMENT

The Ninth Circuit’s categorical refusal to recognize that teachers retain their fundamental First Amendment rights in many situations requires correction by this Court. That a public school teacher wears a private citizen’s hat, as well as a public employee’s hat, confuses no one. Teachers’ private citizens’ rights must be protected against encroachment by the state; and to that end, this Court should grant the Petition.

ARGUMENT

The Ninth Circuit’s decision sets a precedent that strikes at teachers’ fundamental freedoms of speech, religion, and assembly. It should not be allowed to stand.

The Ninth Circuit panel seems to have a view of religion that it may be put on and shed at will, or at least that it is a purely private enterprise that can be wholly internalized and should be hidden during government employment. That is not an accurate

view: Jews wear yarmulkes, Muslim women wear a hijab, and the New Testament enjoins Christians to do “*all* in the name of the Lord Jesus, giving thanks to God the Father through him.” (Col. 3:17, NIV (emphasis added).) The circuit’s restrictive view is also antithetical to the First Amendment’s protection of the free exercise of religion, speech, and assembly.

Obviously, a public school teacher wears two hats—that of a private citizen and that of a government worker. No one is confused by that. Thus, action taken by a teacher, even on school grounds and during school hours, that is personal in nature has the protection of the Free Exercise, Speech, and Assembly Clauses and does not implicate the Establishment Clause.

For a teacher, such actions of a private nature include wearing an armband protesting the death penalty for religious reasons, wearing a necklace with a crucifix, having a Bible at one’s desk, silently reading the Qur’an while proctoring a test, having a bumper sticker on one’s car on school grounds depicting church affiliation, bowing one’s head to say grace in the cafeteria, hanging a favorite Scripture verse on one’s office wall, attending a student-led religious club, and explaining personal views on religious subject matter when asked. The Ninth Circuit’s reasoning makes unconstitutional all these common behaviors when done by teachers, including some that have been protected by Congress and specifically held to be constitutional by this Court, and some that are approved in a Joint Statement adopted by President Clinton and recently reaffirmed as

having the force of an executive order by the current administration.²

Coach Kennedy waited until the game was well over and acted alone. His speech was private. Presumably, if he had not knelt and closed his eyes, but had spoken whatever message he wished while standing and with his eyes open, no one would have complained. The problem, then, was that he made it too obvious that he was exercising his religion. But he was no more obvious in that respect than a Muslim teacher wearing a hijab, *see EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015), or a Christian teacher's attendance at a student Bible club. This Court stated in *Mergens*, "We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." 496 U.S. at 250. The same is true for teacher speech, whether religious in nature or otherwise and whether done standing or on one knee. *See Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). It turns the Constitution on its head to suggest that teachers may practice spoken

² *See Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226 (1990) (upholding provisions of Equal Access Act, 20 U.S.C. §§ 4071-74, requiring religious clubs to have the same privileges as other student clubs in secondary schools along with teacher supervision of them, while protecting a teacher's right not to supervise a club to which he has religious objection); 10/6/17 DOJ Memorandum for All Executive Agencies, published at <https://www.gpo.gov/fussy/pkg/WCPD-1997-08-18/pdf/WCPD-1997-08-18-Pg1246.pdf> at 6-7, 10a-11a (listing similar examples).

or symbolic speech only as long as it does not involve prayer or other religious observance, when “the free exercise of” religion is in the very text of the First Amendment.

CONCLUSION

The Establishment Clause does not require schools to be policed as religion-free zones. To the contrary, when teachers are acting in a private capacity, even when on school grounds and during school hours, their freedoms are not to be curtailed. This Court has made that clear for other government workers. *See Lane v. Franks*, 134 S. Ct. 2369 (2014); *Garcetti v. Ceballos*, 547 U.S. 410 (2006). It should make it just as clear for teachers by granting the Petition and reversing the Ninth Circuit’s decision in this case.

Respectfully submitted,
this 1 day of August 2018,

Frederick W. Claybrook, Jr.
Counsel of Record
700 Sixth St., NW, Ste. 430
Washington, DC 20001

Steven W. Fitschen
The National Legal Foundation
524 Johnstown Rd.
Chesapeake, VA 23322